BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROY DEAN CRAIG	)	
Claimant	)	
	)	
VS.	)	
	)	
VAL ENERGY, INC.	)	
Respondent	)	Docket No. **1,036,182**
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the May 5, 2010 Award by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on August 3, 2010. On November 2, 2010, the Division's Acting Director, Seth G. Valerius, appointed a Pro Tem Board Member in place of Carol Foreman, who retired. On March 18, 2011, the Division's Acting Director, Anne Haught, rescinded the Pro Tem appointment as the vacant position on the Board had been filled.

APPEARANCES

Melinda G. Young of Hutchinson, Kansas, appeared for the claimant. John D. Jurcyk of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The parties also stipulated that claimant suffered a 15 percent functional impairment to the body as a whole.[1]

ISSUES

Claimant suffered injuries in a single vehicle accident that occurred as he was driving a co-worker and himself to their homes at the end of their work day. Claimant argued that travel was an integral part of his job as a driller for respondent's oil field

[1] R.H. Trans. at 43.

production crew. Respondent denied the claim and argued it was barred by the “going and coming rule” codified at K.S.A. 44-508(f).

The Administrative Law Judge (ALJ) found claimant’s accident did not arise out of or in the course of his employment because K.S.A. 44-508(f) was applicable to bar his claim.

Claimant requests review of whether claimant's accidental injury arose out of and in the course of employment and whether this claim is barred by the "going and coming rule". Claimant argues that travel was an inherent part of claimant’s job as an oil driller and therefore the automobile accident that occurred on claimant’s trip to take himself and a co-worker to their homes arose out of and in the course of his employment with respondent.

Respondent argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ stated the pertinent facts regarding the claimant’s employment and accidental injury in the following fashion:

> Claimant was hired as a driller for one of Respondent’s oil field production crews. Among his responsibilities as driller was to run the drilling rig, provide a crew to operate the drilling rig, and drive members of his crew to and from the drilling site. Claimant used his personal vehicle, but was reimbursed mileage expenses for driving from his home, to the homes of his crew, to the drilling site and home again at the end of the shift. Claimant would not have been hired as a driller for Respondent if he did not have the capability to drive and transport his crew as needed.
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> Customarily, Claimant worked in a drilling rig south of Medicine Lodge, Kansas. His crew consisted of himself and three others, one of whom was his son. For approximately a week in July, 2007, the drilling rig to which Claimant was assigned was down and inoperable. Claimant and his crew were temporarily assigned to work in Respondent’s fixed-location shop in Great Bend, Kansas. Claimant lived in Pratt, Kansas, and for five consecutive days he drove four blocks to pick up his son (in Pratt) and transported him to and from the shop in Great Bend.
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> On July 27, 2007, Claimant was on his way home at the end of his shift at the shop when he was involved in a one-vehicle accident, on the route from Great Bend to his home in Pratt. During his temporary assignment to the shop in Great

> Bend, Claimant was still paid his mileage expenses incurred in traveling from his home to pick up crew members, to the shop in Great Bend, and home again. Claimant suffered injuries to his head, back, ribs and right hand in the accident. [2]

Contrary to the ALJ's finding of fact, the evidentiary record established that claimant worked on oil rigs at various locations, usually south of Medicine Lodge. In addition, it should be noted that claimant also received a per diem amount of $24 per day that he showed up to work. And claimant was taking a co-worker (his son) home before heading to his home.

Claimant stated that he does not remember what happened and believes that he must have passed out. Claimant stated that he was about 3 miles north of St. John when the accident occurred. Claimant was taken to the Stafford District Hospital and then flown to St. Francis Hospital for treatment of head, neck and back injuries.

Dr. Raymond Grundmeyer III, a board certified neurosurgeon, had his first consultation with claimant on July 28, 2007, while claimant was hospitalized. Dr. Grundmeyer diagnosed claimant at that time with a mild concussion and thoracic T12 and lumbar L1 endplate fractures. Claimant was prescribed medication for pain and muscle relaxants as well as a brace for a period of time in order to allow the bone fractures to heal. The doctor continued to observe claimant's clinical status to make sure there were no signs of instability or worsening of the fractures that would require surgical intervention.

On July 1, 2008, Dr. Grundmeyer opined claimant had reached maximum medical improvement and released him to return to work with a 50-pound weight restriction. The doctor also included no frequent or repetitive lifting, pushing and pulling of 50 pounds. Dr. Grundmeyer did not provide an impairment rating.

Claimant stated that initially he was told that he still had a job waiting for him when he got better and then he received a letter on August 17th that stated that his employment had been terminated on July 29th due to supervision changes. Claimant then returned to work as a driller for a different company but that operation shut down after a few months and claimant has not worked since that time. At the regular hearing on January 13, 2010, claimant testified he currently has constant back pain and takes pain pills to get relief. He is not able to sleep at night and he cannot stand for a long period of time without pain

On October 10, 2008, Dr. Paul Stein performed an examination and evaluation of claimant at the request of the claimant's attorney. The doctor reviewed claimant's medical records and took a history. Based upon his examination, the doctor found claimant had difficulty walking on his heels and toes as well as decreased motion in his cervical spine due to pain in his back. Dr. Stein diagnosed claimant as having bilateral spondylolysis at

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[2] ALJ Award (May 5, 2010) at 3.

L5 with spondylolisthesis. The doctor recommended flexion/extension x-rays of the neck and lower back, an MRI of the cervical and lower back, possible epidural injections or a lumbar discogram. Dr. Stein imposed restrictions that claimant avoid lifting, pushing or pulling more than 50 pounds. Dr. Stein noted his restrictions would continue as permanent restrictions if no additional treatment for claimant was obtained.

Dr. Pedro Murati, board certified in physical medicine and rehabilitation, examined claimant on June 15, 2009, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with left rotator cuff tear; left costal chondritis; myofascial pain syndrome affecting the left shoulder girdle extending into the cervical paraspinals; left SI joint dysfunction; and, low back pain with signs and symptoms of radiculopathy.

Based upon the AMA *Guides*[3], the doctor concluded claimant had an 8 percent left upper extremity impairment for severe AC crepitus which converts to a 5 percent whole person impairment; 3 percent whole person impairment for left costal chondritis; 5 percent whole person impairment for myofascial pain syndrome affecting the cervical parspinals; and a 10 percent whole person impairment for low back pain secondary to radiculopathy. The whole person impairments combine for a 21 percent.

The doctor imposed permanent restrictions that in an 8-hour day claimant should engage in no crawling, climbing or lift/carry/push/pull greater than 20 pounds. Claimant should rarely bend, crouch and stoop as well as avoid working more than 24 inches from the body. He should limit frequent standing and walking, avoid awkward positions of the neck and alternate sitting, standing and walking.

Robert W. Barnett, Ph.D., certified rehabilitation counselor, conducted a telephone interview of claimant on July 27, 2009. Dr. Barnett reviewed medical records and obtained a 15-year employment history. He prepared a task list of 22 non-duplicative tasks claimant performed in the 15 years before his injury.

Dr. Murati reviewed the list of claimant's former work tasks prepared by Dr. Robert Barnett and opined claimant could no longer perform 21 of the 22 tasks for a 95 percent task loss. Dr. Grundmeyer reviewed Dr. Barnett's job task list and opined claimant could no longer perform 11 of the 22 tasks for a 50 percent task loss.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

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[3] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[5]

The "going and coming" rule contained in K.S.A. 2008 Supp. 44-508(f) provides in pertinent part:

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

K.S.A. 2008 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[6] In *Thompson*,[7] the Kansas Supreme Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2008 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[8] Another exception is when the worker is injured while using the only route

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[4] K.S.A. 2008 Supp. 44-501(a).

[5] K.S.A. 2008 Supp. 44-508(g).

[6] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, Syl. ¶ 1, 416 P.2d 754 (1966).

[7] *Thompson* v. *Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[8] *Id*. at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area controlled by the employer. See also, *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[9]

The Kansas appellate courts have also noted that the "going and coming" rule, does not apply when the worker is injured while operating a motor vehicle on a public roadway and the operation of the vehicle is an integral part or is necessary to the employment.[10] And it has been held that the "going and coming" rule is inapplicable when the travel is for a special purpose and when employees are paid for their travel time and/or expenses.[11]

In this case the accident did not occur on the respondent's premises. Nor was the claimant injured while using the only route available to or from work involving a special risk or hazard. Consequently, the statutory exceptions contained in K.S.A. 2008 Supp. 44-508(f) are not applicable to this fact situation. But the analysis does not end with that determination.

In *Messenger* the Kansas Court of Appeals applied an exception to the "going and coming" rule that allows workers compensation coverage where travel on public roadways is an integral or necessary part of the employment.[12] An accident that occurred when Messenger was returning home from a temporary work site was held compensable because he was required to travel and provide his own transportation, he was compensated for his travel, and both Messenger and his employer benefitted from that travel arrangement. In holding that the "going and coming" rule did not apply, the Court of Appeals stressed the benefit that the employer derived from the travel arrangement.

> Kansas has long recognized one very basic exception to the "going and coming" rule. That exception applies when the operation of a motor vehicle on the public roadways is an integral part of the employment or is inherent in the nature of the employment or is necessary to the employment, so that in his travels the employee was furthering the interests of his employer.[13]

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[9] *Id*. at 40.

[10] *Halford v. Nowak Const. Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008); *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556 *rev. denied* 235 Kan. 1042 (1984).

[11] *Ridnour v. Kenneth R. Johnson, Inc.*, 34 Kan. App. 2d 720, Syl. ¶ 5, 124 P.3d 87 (2005), *rev. denied* 281 Kan. 1378 (2006).

[12] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[13] *Messenger* at 437.

In *Kindel*,[14] the Kansas Supreme Court approved the *Messenger* decision and stated:

> Although K.S.A. 1991 Supp. 44-508(f), a codification of the longstanding "going and coming" rule, provides that injuries occurring while traveling to and from employment are generally not compensable, there is an exception which applies when travel upon the public roadways is an integral or necessary part of the employment. (Citations omitted.) Because Kindel and other Ferco employees were expected to live out of town during the work weeks, and transportation to and from the remote site was in a company vehicle driven by a supervisor, this case falls within the exception to the general rule.[15]

In a more recent decision, the Kansas Court of Appeals in *Brobst*[16] reiterated that accidents occurring while going and coming from work are compensable where travel is either (a) intrinsic to the job or (b) required to complete some special work-related errand or trip. The Court of Appeals stated:

> . . . Kansas case law recognizes a distinction between accidents incurred during the normal going and coming from a regular permanent work location and accidents incurred during going and coming in an employment in which the going and coming is an incident of the employment itself.
>
> Under this third qualification to the going and coming rule, injuries incurred while going and coming from places where work-related tasks occur can be compensable where the traveling is (a) intrinsic to the profession or (b) required in order to complete some special work-related errand or special-purpose trip in the scope of the employment. This third exception has been noted in several Kansas cases, many of which post-date the 1968 premises and special hazard amendments to the Workers Compensation Act.[17] (Citations omitted.)

In this case the claimant was traveling because it was a requirement of his employment. Claimant was required to travel to the oil rigs where he customarily worked and was paid for his mileage both to and from work. He also received a per diem amount. And claimant would not have been hired if he did not have the capability to drive and transport his crew.

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[14] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[15] *Kindel* at 277.

[16] *Brobst v. Brighton Place North,* 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

[17] *Brobst* at 773-774.

There is no doubt that travel was inherent in claimant's job and that his job site varied. On this particular occasion, his job assignment required him to go to the brick and mortar location rather than a remote location. Although this location was respondent's home office it was not claimant's customary work site. And claimant was still transporting a co-worker. Whether his travel involved a remote location or a more local destination, he was nonetheless required to travel and was compensated for that travel.

This claim has certain similarities to the *Messenger* and *Kindel* decisions where it was determined that travel was an integral part of the job. This case would also be analogous to the special errand exception and where the employees are paid for their time or travel expenses as claimant was traveling to a temporary assignment at respondent's home base instead of the distant oil rigs where he normally worked. The injury arose out of and in the course of his employment with respondent. Therefore, the accident is compensable under the Workers Compensation Act.

Respondent argues that as a consequence of the recent *Bergstrom*,[18] decision the only exceptions to the "going and coming" rule are the two specific exceptions enumerated in K.S.A. 2008 Supp. 44-508(f). In *Bergstrom*,[19] the Kansas Supreme Court recently held:

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.

The court further held:

> A history of incorrectly decided cases does not compel the Supreme Court to disregard plain statutory language and to perpetuate incorrect analysis of workers compensation statutes. The court is not inexorably bound by precedent, and it will reject rules that were originally erroneous or are no longer sound.[20]

Respondent further argues that the inherent travel and special purpose exceptions to the "going and coming" rule are judicially created exceptions and, applying the strict literal construction rule of *Bergstrom*, should no longer be precedential.

The Board disagrees. The integral travel and special purpose findings in the reported judicial cases were simply judicial determinations that the "going and coming rule"

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[18] *Bergstrom v. Spears Mfg. Co.*, 289 Kan. 605, Syl. ¶ 1, 214 P.3d 676 (2009).

[19] *Id*.

[20] *Id.*, Syl. ¶ 2.

was not applicable because the workers in those cases were already in the course of employment when the accidents occurred. Stated another way, the workers were not on the way to work because the travel itself was a part of the job. This distinction was accurately noted in the concurring opinion in *Halford* [21] where it was stated in pertinent part:

> I merely wish to add that the exception to the going-and-coming rule for travel that is intrinsic to the job is firmly rooted in the statutory language, even though many cases have referred to it as a judicially created exception. The statute provides that a worker is not covered "while the employee is on the way to assume the duties of employment." K.S.A. 4-508(f). Where travel is truly an intrinsic part of the job, the employee has already assumed the duties of employment once he or she heads out for the day's work. Thus, the employee is no longer "on the way to assume the duties of employment"-he or she has already begun the essential tasks of the job. Such an employee is covered by the Workers Compensation Act and is not excluded from coverage by the going-and-coming rule.

Moreover, the *Bergstrom* case neither construed K.S.A. 2008 Supp. 44-508(f) nor overruled any cases that have interpreted that statute and is factually distinguishable. Accordingly, the Board finds claimant's accident and injury arose out of and in the course of his employment with respondent and is not barred by the going and coming rule.

Because claimant has a back injury, which does not fall within the schedule of K.S.A. 44-510d, the calculation of claimant's permanent partial disability benefits is governed by K.S.A. 44-510e, which provides, in part:

> **The extent of permanent partial general disability** shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has **lost the ability to perform the work tasks** that the employee performed in any substantial gainful employment **during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is

[21] *Halford v. Nowak Const. Co.,* 39 Kan. App. 2d 935, 942, 186 P.3d 206, *rev. denied* ___ Kan. ___ (2008).

> engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

In *Bergstrom*,[22] the Kansas Supreme Court made clear that the language of K.S.A. 44-510e is clear and unambiguous and its express language should be applied without attempting to determine what the law should or should not be. Consequently, *Bergstrom* overruled a host of opinions that had held a worker's post-injury wage would be imputed unless the worker had shown good faith in seeking post-injury employment. The Kansas Supreme Court stated, in pertinent part:

> K.S.A. 44-510e(a) contains no requirement that an injured worker make a good-faith effort to seek postinjury employment to mitigate the employer's liability. *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997), and all subsequent cases that have imposed a good-faith effort requirement on injured workers are disapproved.[23]
>
> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[24]

Bergstrom stands for the proposition that neither the ALJ nor this Board is provided the authority to announce public policy for the State. Consequently, the express language of K.S.A. 44-510e is observed and claimant's actual post-injury earnings must be used in computing his permanent partial general disability.

The claimant testified that he returned to work as a driller for three months after he was released from treatment with Dr. Grundmeyer. But after that job ended he has not

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[22] *Bergstrom v. Spears Mfg. Company*, 289 Kan. 605, 214 P.3d 676 (2009).

[23] *Id.*, Syl. ¶ 3.

[24] *Id.*, at 609-610.

returned to work for any employer. The permanent partial general disability formula under K.S.A. 44-510e is an average of the worker's wage loss and task loss. Claimant at the time of the regular hearing was unemployed and has suffered a 100 percent wage loss.[25]

The ALJ analyzed the task loss evidence and made the following pertinent findings:

> Dr. Murati reviewed Dr. Barnett's job task list and opined that Claimant had lost the ability to perform 21 of 22 identified tasks, for a "task loss" of 95% (applying Dr. Murati's permanent work restrictions, which Claimant does not observe). Dr. Murati opined that Claimant was unable to perform the job tasks of a driller, even though Claimant was actively working in that position with Sterling Drilling at the time of his evaluation.
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> Dr. Grundmeyer reviewed Dr. Barnett's job task list and opined that Claiamnt had lost the ability to perform 11 of 22 identified tasks, for a "task loss" of 50%.
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> As Claimant observes Dr. Grundmeyer's restrictions, and does not either conform his behavior to Dr. Murati's restrictions, nor disclose those restrictions to prospective employers, and as Claimant successfully performed the duties of driller after his return to work, the court finds Dr. Grundmeyer's task loss opinion to be more credible. Claimant has suffered a 50% task loss.[26]

The Board agrees and finds claimant has suffered a 50 percent task loss. Accordingly, claimant's 100 percent wage loss is averaged with his 50 percent task loss, which creates a 75 percent work disability.

The claimant is entitled to authorized medical expenses to be paid by respondent as well as unauthorized medical expenses, if any. Approval of claimant's attorney's fee contract is remanded for determination by the ALJ.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated May 5, 2010, is modified to reflect claimant suffered accidental injury arising out of and in the course of employment and is entitled to compensation for a 75 percent permanent partial work disability.

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[25] The Board is mindful that during the three months claimant worked after his release from treatment his wage loss would not be 100 percent for that time period. However, that was not included in the calculation of the award as it would not change the total compensation claimant is entitled to under the award.

[26] ALJ Award (May 5, 2010) at 5-6.

Claimant is entitled to 43.34 weeks of temporary total disability compensation at the rate of $510 per week or $22,103.40 followed by permanent partial disability compensation at the rate of $510 per week not to exceed $100,000 for a 75 percent work disability.

As of March 29, 2011, there would be due and owing to the claimant 43.34 weeks of temporary total disability compensation at the rate of $510 per week in the sum of $22,103.40 plus 148.23 weeks of permanent partial disability compensation at the rate of $510 per week in the sum of $75,597.30 for a total due and owing of $97,700.70, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $2,299.30 shall be paid at the rate of $510 per week until fully paid or until further order from the Director.

IT IS SO ORDERED.

Dated this 31st day of March, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Melinda G. Young, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge